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*Counsel for TransCanada Keystone Pipeline, LP and TC Energy Corporation*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION**

NORTHERN PLAINS RESOURCE  
COUNCIL, BOLD ALLIANCE, NATURAL  
RESOURCES DEFENSE COUNCIL,  
SIERRA CLUB, CENTER FOR  
BIOLOGICAL DIVERSITY, and FRIENDS  
OF THE EARTH,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF  
ENGINEERS and LT. GENERAL TODD T.  
SEMONITE (in his official capacity as U.S.  
Army Chief of Engineers and Commanding  
General of the U.S. Army Chief of Engineers),

Defendants.

TRANSCANADA KEYSTONE PIPELINE,  
LP, a Delaware limited partnership, and TC  
ENERGY CORPORATION, a Canadian  
Public company, THE STATE OF  
MONTANA, AMERICAN GAS

CV 19-44-GF-BMM

**MOTION FOR PARTIAL  
SUMMARY JUDGMENT BY  
TRANSCANADA  
KEYSTONE PIPELINE, LP  
AND TC ENERGY  
CORPORATION**

ASSOCIATION, AMERICAN PETROLEUM  
INSTITUTE, ASSOCIATION OF OIL  
PIPELINES, INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA, and  
NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION,

Defendant-Intervenors.

## **MOTION**

Defendant-Intervenors TransCanada Keystone Pipeline LP and TC Energy Corporation (TC Energy) respectfully move for summary judgment on the first, second, and fourth claims stated in Plaintiffs' Amended Complaint.

As set forth in the accompanying memorandum supporting this motion, the U.S. Army Corps of Engineers (Corps) complied with the Clean Water Act (CWA), National Environmental Policy Act (NEPA), and Endangered Species Act (ESA) when reissuing Nationwide Permit 12 (NWP 12). Accordingly, Plaintiffs are not entitled to partial summary judgment on these claims, nor are they entitled to the relief requested on page 44 of Plaintiffs' Memorandum in Support of Motion for Summary Judgment: a "declar[ation] that NWP 12—and its specific application to Keystone XL—violated the CWA, NPEA, and ESA;" a "remand [of] NWP 12 to the Corps for Compliance with these statutes;" or an injunction against "the use of NWP 12 to authorize the construction of Keystone XL."

Regarding Plaintiffs' NEPA claims, the Corps reasonably confined its analysis to be consistent with its regulatory authority. Because the Corps does not regulate oil pipelines or any large utility line projects, it was not necessary for the agency to look at the potential operational impacts (e.g., oil spill risks or climate change impacts) of such projects. Such impacts are addressed by the regulatory authorities with authority over those projects. The Corps' focus under NEPA when promulgating Nationwide Permits, therefore, should be the potential construction impacts related to the deposition of dredged or fill materials into jurisdictional waters of the United States as authorized by CWA section 404(e).

The Corps' NEPA analysis regarding potential impacts of horizontal directional drilling (HDD) also complied with NEPA. The Corps acknowledged that drilling fluid releases could occur during HDD activities and imposed notification and remediation requirements to ensure such activities would not have a significant environmental impact.

The Corps also complied with its obligations under the ESA. As demonstrated by the record, the Corps reasonably concluded that the issuance of NWP 12 would not adversely affect protected species. NWP 12 does not authorize projects or activities that impact threatened or endangered species or critical habitat. Any activity that "may affect" listed species or critical habitat must be scrutinized to determine whether Section 7 consultation is necessary prior to any

work being done. Thus, the Corps' determination that NWP 12 would have no effect was reasonable, as was its decision not to undertake formal programmatic consultation.

The issuance of NWP 12 complied with the CWA because it authorizes only those activities that would have only minimal direct or cumulative environmental impacts. In promulgating NWP 12, the Corps thoroughly considered actions to minimize adverse effects and incorporated protective measures into NWP 12 so any potential adverse impacts would be controlled by the terms and conditions of NWP 12, including regional conditions.

Finally, NWP 12 has not yet been applied to Keystone XL because TC Energy has not submitted the required pre-construction notifications to the Corps, and the Corps has not verified that the activities discussed in those notifications are authorized by NWP 12. It is therefore inappropriate to declare unlawful or enjoin NWP 12 as applied to Keystone XL.

Because NWP 12 complies with NEPA, ESA and the CWA, and as discussed in greater detail in the accompanying Memorandum of Law in Support of this Motion, TC Energy's motion for partial summary judgment should be granted.

DATED this 23rd day of December, 2019,

/s/ Peter R. Steenland, Jr.

Peter R. Steenland, Jr.

Peter C. Whitfield

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Jeffery J. Oven